does not mean that estoppel cannot be raised. Further, it was submitted that the appellant was not given reasonable time to complete. It is the submission of the appellant that there are triable issues to be tried. Reference was made to a passage in *European Bank* case[17] at page 659 which reads:

"... There was no evidence before the judge that the defendants had in any way acted or failed to act, in reliance upon that misrepresentation; indeed the misrepresentation was not even pleaded in the defendant's points of defence. But the judge felt that he should not shut the defendants out from proving, if they could, that they had relied on it."

It should be pointed out that the Court of Appeal considered that the learned Judge's approach to the matter was not correct. It was pointed out that the fact of misrepresentation was known to the defendants in 1981 at the time of the stay proceedings. In his affidavit dated March, 1981 the defendants' solicitors stated that it would be necessary to ascertain whether the defendants were misled by it. In their points of defence, served over a year later in July, 1982, there was no plea whatsoever on this representation. A misrepresentation is in itself of no relevance in law. It is not right that leave to defend an action should be given to enable a party to hunt around for evidence to show that he has acted upon a misrepresentation, especially when he has had over a year to discover that evidence before the summons for judgment is heard.

The summary jurisdiction conferred by Order 81 must be used with great care. It provides a procedure similar to Order 14. Where all the issues are clear, summary judgment should be given. A defendant ought not to be shut out from defending unless it is very clear that he has no case in the action. A complete defence need not be shown. The defence set up need only show that there is a triable issue or question or that for some reason there ought to be a trial. Here the defence is alleging not only variation but also estoppel which was not dealt with by the learned Judge. In view of this it could not be said that the liability for breach of contract had been clearly established. Accordingly, we would allow the appeal with costs and set aside the order of the learned Judge and give the appellant unconditional leave to defend. Deposit shall be refunded to the appellant.

Appeal allowed.

Solicitors: *Philip Choong & Co.; Wang Kuo Shing & Co.*

BECA (MALAYSIA) SDN. BHD. v. TAN CHOONG KUANG & ANOR.

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Seah S.C. JJ.) May 6 & September 30, 1985]

[Kota Kinabulu – Federal Court Civil Appeal No. 280 of 1984]

Contract – Contract for sale of flats – Contract made before issuance of Developer's Licence to Vendors – Claim for return of booking fee – Agreement voidable at instance of purchaser – Distinction between agreement and contract – Housing (Control and Licensing of Developers) Rules, 1980, r. 10(2) – Housing (Control and Licensing of Developers) Enactment, 1978 – Contracts Act 1950, ss. 2 & 66.

Conveyancing – Sale of flat – Contract made before issuance of Developer's Licence to Vendors – Claim for return of deposit – Whether contract voidable.

Housing Developers – Agreement voidable at instance of purchaser – Election.

In this case the appellants were housing developers. The respondents had agreed to buy three units of flats from the appellants and paid a deposit of $20,000.00. The deposit was made before the issuance of the Developer's Licence to the appellants. The respondents subsequently refused to sign the Sale and Purchase Agreement and claimed a refund of the deposit. The learned President of the Sessions Court held that the deposit was meant to be a booking fee and not part payment. The appellants had not obtained the licence and permit at the time of collecting the deposit and therefore they were not authorised to collect the deposit. He therefore ordered the refund of the deposit. An appeal to the High Court was dismissed. The appellant appealed to the Supreme Court.

Held: the agreement in this case was valid but was voidable at the instance of the buyers. The buyers had elected to avoid the agreement and they were entitled to claim for the return of the deposit.

Cases referred to:

(1) *Mary-Ann Arrichiello* v. *Tanglin Studio Pte. Ltd.* [1981] 2 M.L.J. 60.
(2) *Daiman Development Sdn. Bhd.* v. *Mathew Lui Chin Teck & Anor.* [1981] 1 M.L.J. 56.
(3) *Kin Nam Development Sdn. Bhd.* v. *Khau Daw Yau* [1984] 1 M.L.J. 256.
(4) *Yeep Mooi* v. *Chu Chin Chua & Ors.* [1981] 1 M.L.J. 14.
(5) *John B. Skilling & Ors.* v. *Consolidated Hotels Ltd.* [1979] 2 M.L.J. 2.
(6) *Curragh Investments Ltd.* v. *Cook* [1974] 1 W.L.R. 1559, 1563; [1974] 3 All E.R. 658.
(7) *Raymond Banham & Anor.* v. *Consolidated Hotels Ltd.* [1976] 1 M.L.J. 5.

SUPREME COURT.

Lawrence Thien for the appellants.
Stephen K.S. Foo for the respondents.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the Judgment of the Court): This appeal is against the dismissal by the learned Judge of an appeal from the decision of the Sessions Court, Kota Kinabalu.

Briefly, the appellants are a company incorporated in Malaysia with its registered office at Tingkat 5, Wisma Central, Jalan Ampang, Kuala Lumpur. They are housing developers. One of their ventures was the development of an area of land in Sandakan at Mile 2, Leila Road, Tanah Merah into a commercial and residential complex known as Leila Komplex. The respondents agreed to buy 3 units of flats costing $703,685.00 from the appellants and on May 1, 1981 paid a deposit of $20,000.00. It was common ground that the deposit was made before the issuance of the Developer's Licence and the Sale Advertisement Permit on September 26, 1981. The respondents were asked to sign the Sale and Purchase Agreement on May 23, 1981. They did not sign it. Instead, through their solicitors, they claimed for the refund of the deposit on the ground that the deposit was collected illegally under Rule 10(2) of the Housing (Control and Licensing of Developers) Rules, 1980 (hereinafter referred to as "the Rules"). These Rules were made under the Housing (Control and Licensing of Developers) Enactment, 1978 (hereinafter referred to as "the Enactment") on January 23, 1980 and which were gazetted on May 15, 1980 to come in force on July 1, 1980.

The respondents claimed that the payment of the deposit was intended to be a "booking fee". On the other hand the appellants maintained that the deposit was in actual fact part payment towards the purchase price of the three units of flats. They said that the payment was not illegal by reason of or prohibited under the said Rule 10(2). They counterclaimed for the deposit to be forfeited. Rule 10 reads as follows:

"10(1) A purchaser of housing accommodation including the land shall not be required to pay a booking fee of a sum exceeding 2.5 per centum of the purchase price of such housing accommodation including the land.

(2) Notwithstanding paragraph (1) of this Rule, no purchaser of a housing accommodation including the land shall be required to pay a booking fee of a sum exceeding one thousand ringgit.

(3) For purposes of this Rule the term 'booking fee' shall include any payment by whatever name called which payment gives the purchaser an option or right to purchase the housing accommodation including the land."

The learned President of the Sessions Court held that the deposit was meant to be a booking fee and not part payment. At the time of collecting the deposit the appellants had not as yet obtained the licence and permit. Without the proper licence they were not authorised to collect deposit. He, therefore, ordered the refund of the deposit and dismissed the counterclaim. In dismissing the appeal the learned Judge stated at page 8 of the Appeal Record:

"... Rule 10(1) and 10(2) limits the amount of booking fee which may be collected by a housing developer from a purchaser. Rule 10(3) is clearly enacted to prevent any attempt by a housing developer to contract out of its provisions ..."

Having set out Rule 19(3) the learned Judge went on:

"The payment of the deposit in my judgment was caught by the provisions of the above rule. It was not disputed that such payment had given the respondents in this case the option or right to purchase the 3 units of flats. To hold that the deposit was part payment and not booking fee would render its provisions a dead letter and to reinstate the mischief which the rule was designed to remedy."

Before us the same arguments as in the lower courts were used. We agree with the learned Judge that the main issue is really what is the effect of the provisional agreement entered into by the parties before the issuance of the licence to the developers. It is the submission of the appellants that a contract which does not comply with the said Enactment and Rules made thereunder is not invalid and should be enforceable according to its terms. The Singapore case of *Mary-Ann Arrichiello* v. *Tanglin Studio Pte. Ltd.*[1] and *Daiman Development Sdn. Bhd.* v. *Mathew Lui Chin Teck & Anor.*[2] were cited in support. The appellants said that relevant provisions of the Singapore Housing Developers (Control and Licensing Act (Cap. 250)) and the Housing Developers Rules, 1976 are substantially similar to the Sabah Enactment and Rules. The only difference is that in the Singapore case the developers had a licence whereas in the instant case the developers had no licence. It was submitted that there was no difference whether the developers had the licence or not before the agreement was entered into.

At page 63 of the Singapore case, Chua J. stated:

"The buying and selling of houses or flats is not a prohibited activity under the law. Anyone (except foreigners in certain cases) can buy and sell houses and flats in Singapore. The Act seeks to control housing development not the sale and purchase of properties ... Section 21 of the Act is merely seeking to control, amongst other things, the mode

of performance of the contract of sale by housing developers and it seeks to do this through a licence granted to the developer. It does not in any way prohibit the formation of an agreement. Certain procedures are provided for certain activities, for example, in advertising, in raising a loan on the property and in agreements for sale. The so-called legal impediment exists on the face of the licence only. Each licence could have its own limitations. Whether or not a developer is under an impediment is personal only to the developer.

.....

The Act is merely prescribing a method of performance by the housing developer for the protection of a class of persons – to protect purchasers as far as possible from the risk of exploitation. The Act does not in any way prohibit the making of a contract for sale and purchase of flats. The licence that the Act requires is a licence to develop."

Chua, J. then referred to *Daiman's* case,[2] particularly when Suffian, then L.P. said that the *pro forma* was a firm contract. He therefore concluded that "the contract between the plaintiff and the defendants is not illegal and is enforceable."

In *Daiman's* case[2] Sir Garfield Barwick, after referring to Rules 10 and 12 which are the same as the Sabah Rules, stated at page 59 onwards:

"Rule 17 provides that contravention by a licensed housing developer of any of the rules shall be an offence and render the developer liable on conviction to a fine or, for a second or subsequent offence, a fine or imprisonment or both. Nothing in the rules expressly purports to invalidate a contract which does not comply with the provisions of the rules.

The rules impose no penalties on a purchaser who enters into a contract which does not conform to the requirements of the rules. Clearly rule 12 does not exclude the possibility of the contract of sale containing terms and conditions other than such as are designed to effectuate the requirements of the rules. Rule 12 requires a contract to contain within its terms the stipulated provisions. It is observable that rule 12 does cover much of the relationship of vendor and purchaser in relation to the purchase and is mandatory so far as the appellant is concerned."

By Rule 10(3) the $20,000.00 is clearly meant to be "booking fee". It makes no difference by whatever name such payment is called. Such payment gives the purchaser an option or right to purchase the three flats. If the purchaser fails to exercise the option or right then he would forfeit such payment. Thus it seems that the parties appear to concede that if the provisional agreement is held to be good only $3,000.00 can be forfeited by the developers. If the agreement is to be regarded as illegal, void and unenforceable the developers would have to refund the deposit as under section 66 of the Contracts Act it is provided that:

"When an agreement is discovered to be void...any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

In the recent case of *Kin Nam Development Sdn. Bhd.* v. *Khau Daw Yau*[3] the developers proposed to develop two pieces of land in Kuantan into a housing estate. One of the pieces belonged to the Futo Trading Co. All the lots were booked before approval for conversion and subdivision of the land was obtained. Later, the conversion and subdivision were approved but subject to the condition that a certain number of lots should be reserved for bumiputras. The developers decided not to build any of the houses. Those who had booked the lots sued the developers for specific performance. At the trial the developers contended that they were not liable as the booking did not constitute a binding contract and that even if it did so, the contract was rendered not only impossible of performance but also illegal by the imposition of the special condition. The learned Judge rejected the developers' contention and gave judgment for the purchasers, in the form of damages. In dismissing the appeal the Federal Court, *inter alia*, held that the fact that the developers would no doubt incur a heavy financial burden as a result of the special condition imposed but that was not a relevant factor in involving the doctrine of frustration. In delivering the judgment of the court, Salleh Abas C.J. (Malaya), (as he then was), left open the question whether Malaysian Rule 11(1) of the Housing Developers (Control and Licensing) Rules, 1960 would render a contract illegal by virtue of section 24 of the Contract Act as this was not pleaded by the appellants and also there was no factual basis upon which a ruling could be made. Nevertheless, he also stated at page 259:

"In any case there is nothing illegal about the consideration or object of the contracts because they are only contracts for the sale and purchase of houses, and neither do they come within any of the paragraphs of section 24 quoted above although the appellant may well be guilty of an offence under Rule 17 for contravening Rule 11(1) of the Housing Developers (Control and Licensing) Rules, 1970. In other words, these Rules do not affect the validity or otherwise of the contracts which the developer has signed with the purchasers."

In *Mary-Ann Arrichiello's* case[1] the developers wanted to increase the price of maisonette earlier agreed at $129,600.00 to $135,000.00 by providing "better tiling". When the purchaser

refused to pay the increase and sued for specific performance the developers sought to escape liability by pleading his own illegality to defeat the contract. In *Daiman's* case[2] the same thing happened. The developers sought to increase the purchase price earlier agreed at $26,000.00 to $35,000.00 by "amendments to the building plans and increase of material and constructions." The purchasers did not agree to the increase and applied for specific performance which was granted. In *Kin Nam's* case[3] the developers sought to avoid his liability because of the special condition imposed by the Pahang State Government by not building the houses which were already booked. Here the purchasers were awarded damages instead of specific performance. The developers in the three cases cited had the necessary licences and there was no evidence that when the agreements were entered into any provisions of the Act or Rules had been infringed. Nevertheless, to avoid liabilities the developers pleaded illegality on one ground or another. In the instant case the developers not only had no licence when the provisional agreement was entered into but also had collected deposit far in excess of that allowable under the said Rules. Section 5(1) of the Enactment provides that no housing developer shall engage in, carry on or undertake housing development without (a) being in possession of a licence issued under the Enactment, and (b) having made a deposit with the Controller of a sum equivalent to 5% of the estimated costs of the development. Failure to comply with section 5(1) is an offence punishable under section 20 which carries a fine not exceeding $20,000.00 or imprisonment for a term not exceeding 5 years or both. It was only after the Peguam Negeri wrote to the developers on May 29, 1981, pointing out the above that the developers took the trouble to obtain a licence.

The respondents pointed out that the appellants had not only contravened the provisions of the Enactment but also Rule 10(2) which allows a maximum of $1,000.00 as deposit. They submitted that the provisional agreement was therefore rendered illegal and void. *Yeep Mooi* v. *Chu Chin Chua & Ors.*[4]; *John B. Skilling & Ors.* v. *Consolidated Hotels Ltd.*[5]; and *Curragh Investment Ltd.* v. *Cook*[6] were cited in support. They submitted the learned Judge was right.

The learned Judge was aware that "there is no lack of authorities which support the view that not in all cases where contracts were made in contravention of some statutory provisions such contracts would be considered to be illegal and unenforceable." However, he took the view that "for a contract to be illegal there must be a sufficient nexus between the statutory requirements and the contract and only where the statutory requirements breached were sufficiently linked to the contract then the question of its illegality would arise". He relied on a passage in the judgment of Megarry J. in *Curragh's* case.[6] After referring to *Chitty* on Contracts, 23rd Edition (1968), pages 428 and 429 which discussed the cases in which a transaction in breach of a statutory prohibition was struck with illegality even though the statute did not in terms say so but only imposed some criminal sanction for the breach, Megarry J. expressed his views in the passage cited by the learned Judge. The relevant passage reads:

> "I accept of course, that where a contract is made in contravention of some statutory provision then, in addition to any criminal sanctions, the courts may in some cases find that the contract itself is stricken with illegality. But for this to occur there must be a sufficient nexus between the statutory requirement and the contract. If the statute prohibits the making of contracts of the type in question or provides that one of the parties must satisfy certain requirements (e.g. by obtaining a licence or registering some particulars) before making any contract of the type in question, then the statutory prohibition or requirement may well be sufficiently linked to the contract for questions to arise of the illegality of any contract made in breach of the statutory requirement. But it seems to me a far cry from that to the breach of statutory requirements which are not linked sufficiently or at all to the contract in question. There are today countless statutory requirements of one kind or another, yet I cannot believe that an individual or a company who is in breach of any of these requirements (for example, under the Factories Acts) is thereby disabled from making a legal contract for the sale of land or validly entering into covenants for title. To take an example that was mentioned in argument, I do not think that it could seriously be contended that every contract made by an English company, whether for the sale of land or otherwise, is illegal if, when it is made, the company is liable to prosecution and fine for failing to comply with some provision of the (Companies) Act of 1948, for example, for not filing its annual returns in due time. Such doctrine, for which I can see no justification, would result in chaos. If in the present case I assume that the vendor is in demonstrable breach of sections 407 and 416, I am still quite unable to see how this provides any ground for contending that the covenants for title that the vendor must give will be impaired by illegality. The breach of the law and the covenants for title seem to me to be wholly unconnected."

In *Skilling's* case[5] the appellants were partners in a firm of consultant engineers practising in the United States. They sought to claim their professional fee under an agreement. They were however not registered as required under sections 18 and 19 of the Singapore Professional Engineers Act (Cap. 225). Held, the agreement was illegal as it

infringed the provisions of sections 18 and 19 of the said Act. In an earlier Singapore case of *Raymond Banham & Anor.* v. *Consolidated Hotels Ltd.*[7] Winslow J. disallowed the plaintiff engineer's claim for professional services rendered on the ground of non-registration which infringed the provisions of the Singapore Professional Engineers' Act (Cap. 225). These two cases are concerned with the effect of non-registration of professional engineers under that particular legislation.

It is useful to bear in mind the distinction between an agreement and a contract. The word "contract" has at times been loosely used in the past. We do not see why we should perpetuate such loose use of the words. The reason is simply that we are used to the English common law which does not make the distinction between the two terms as does our section 2 of the Contracts Act. Our section 2 is word for word the same as the equivalent section of the Indian Contracts and Specific Relief Acts. *Pollock & Mulla* on the Indian Contract and Specific Relief Acts, 9th Edition, page 54 observes that:

"The distinction between 'agreement' and 'contract' made by sub-s.(h) is apparently original; it is convenient, and has been adopted by some English writers. The distinction is apparent from section 2. By clause (e) every promise and every set of promises forming the consideration for each other is an agreement and by clause (h) an agreement enforceable by law is a contract. By clause (g) an agreement not enforceable by law is said to be void ..."

We have referred to the transaction as a provisional agreement. What the learned Judge decided was that the "provisional agreement", although "contract" was used, is illegal.

In considering the effect on the agreement consequent upon the breach of the Enactment it is necessary to examine the object of the Enactment. The long Title says clearly that Enactment was to provide for the control and licensing of housing developers and for matters connected therewith. The main purpose was to protect the public from exploitation by unscrupulous developers. We are only concerned in this case with the position of the housing developers going into business without first obtaining a proper licence. Section 5 of the Enactment is clear on this. The law says a housing developer must obtain a licence and pay a certain sum as deposit to the Controller before he can engage in, carry on or undertake the business of housing development. Not every breach of a statutory prohibition would render an agreement illegal or void though such breach may attract criminal penalty. The fundamental question is whether the Enactment means to prohibit the agreement. It is important that the courts should be slow to imply the statutory prohibition of agreement, and should do so only when the implication is clear. Whether an agreement is implicitly forbidden depends upon the construction of the statute, and for this purpose no one test is decisive. Persons who deliberately set out to break the law cannot expect to be aided in a court of justice. It would be a different matter when the law is unwittingly broken. An agreement for the sale of, say, frozen food, is not to be considered illegal or void merely because the premises in which the frozen food is sold does not comply with the law. We recognise that each case must be decided by reference to the relevant statute.

At the height of the housing boom the purchasers of houses were at the mercy of unscrupulous housing developers. These developers collected excessive deposits and delayed building the houses. Invariably the purchasers had to agree to increase in prices by the developers for one reason or another. The situation became so bad that the law had to step in to protect the house buyers. One of the means is to require a housing developer to obtain a licence and to deposit a certain sum of money with the Collector before he can carry on business as a housing developer. Another way is to make rules to ensure that no excessive deposit is collected from would-be house buyers.

So far we have been dealing with cases where the existence of the licence was not in dispute. In the instant case the developers had no licence when they entered into the provisional agreement with the buyers. We think the distinction is most important in deciding the effect on the provisional agreement. The consensus of the authorities would suggest that the contravention of any of the Rules only renders the developers liable to a penalty but does not invalidate any agreement entered into by the developers and the buyers. The question is whether there is any difference in effect on the provisional agreement consequent upon the breach of the Enactment itself. The language of any provision of the Enactment shows clearly that the legislature intends to protect the house buyers from exploitation by the housing developers through the issuance of a licence. In this way the Enactment seeks to control both the housing developers and the mode of their performance. Although the Enactment does not expressly prohibit the making of such an agreement any developer who enters into an agreement without

first obtaining a licence would run the risk of such agreement being declared illegal, void, or unenforceable, or enforceable by one party only.

Under the provisions of the Contracts Act, 1950 where the consent to an agreement has been caused by coercion, fraud, misrepresentation or undue influence, the contract is rendered voidable at the instance of the innocent party. On the effect of non-compliance with statutory requirements, *Chitty* on Contracts (General Principles) 24th Edition, paragraph 223 at page 222 states:

"Non-compliance with such statutory requirements may produce various effects. It may make the contract void, or unenforceable, or unenforceable by one party or enforceable only on an order of the court."

And paragraph 1022 at page 1023 says:

"Statutes which prohibit certain contracts often impliedly recognise, for example by punishing only one of the parties, that the parties are not equally at fault, and therefore on their true construction only one of the parties to the contract is prevented from suing upon it. Accordingly 'when the policy of the Act in question is to protect the general public or a class of persons by requiring that a contract shall be accompanied by certain formalities or conditions, the contract and its performance without those formalities or conditions is illegal, and cannot be sued upon by the person liable to the penalties'. But the other party to the contract is not deprived of his civil remedies because of the criminal default of the guilty party."

The appellants as developers should know that they could not carry on the business of housing development unless they had obtained a licence. Yet, they acted as if they had the necessary licence by collecting deposit from and entering into the provisional agreement with buyers who had no reason to doubt the *bona fide* of the developers. The buyers could not be expected to know that the developers had no licence at the time. It would be expecting too much of the buyers to say that they "had the means of discovering the truth with ordinary diligence" to quote the words of section 19 of the Contracts Act, 1950. The learned President was very careful in dealing with the matter. After referring to the various authorities cited and reviewing the law he came to the conclusion that "the provisional agreement was a binding contract between the parties here; however as the developers did not have the necessary licences when they signed the agreement and collected the deposit, the binding contract is voidable and can be avoided by the innocent party."

Having regard to the scope and purpose of the Enactment and the Rules made thereunder, they are clearly made for the benefit of a class of people, namely, the house buyers. The duty of observing the law is firmly placed on the housing developers for the protection of the house buyers. Hence, any infringement of the law would render the housing developers liable to penalty on conviction. Although the developers have to comply with a number of statutory requirements we are unable to find anything in the Enactment or the Rules which would invalidate an agreement or contract as a result of any breach of the Enactment or the Rules. On the facts of this case we are of the view that the transaction is valid until it is avoided. The buyers had elected to avoid the agreement and claimed for the return of the deposit.

We agree with the dismissal of the appeal from the learned President by the learned Judge but for different reasons. We also agree that the subsequent granting of the licence and the permit by the Controller could in no way rectify the provisional agreement without the consent or knowledge of the buyers. However, with respect, we are unable to agree with the learned Judge that the provisional agreement is illegal. We prefer the approach adopted by the learned President rather than that of the learned Judge on the matter. Since the Enactment is meant to be for the benefit of the house buyers it would seem, in our view, proper and right to regard the provisional agreement as binding but voidable at the instance of the house buyers. They should be given the option of either enforcing or repudiating the agreement depending upon the market situation of the housing development in the country. If the provisional agreement were to be declared illegal it might in a given situation prove profitable to the developers, for instance, when there is a housing boom. In which case it would be absurd to say that the Enactment is to protect the buyers from exploitation when it is actually aiding the developers to enrich themselves. So the avoidance of the agreement would cause inconvenience and injury to innocent members of the public. To declare the agreement binding but voidable at the instance of the buyers would provide no incentive to the developers to do any act before obtaining a proper licence. Accordingly, we would dismiss the appeal with costs. Deposit to the respondents on account of taxed costs.

Appeal dismissed.

Solicitors: *Chau & Thien; Chin Lau & Wong.*